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No. 09-674

In The Supreme Court of the United States

ALLIANCE SHIPPERS, INC.,

Petitioner,

v.

PENOBSCOT FROZEN FOODS, INC., FREDERICK D. STARRETT, III, individually and as an agent of PENOBSCOT FROZEN FOODS, INC., AMERICOLD LOGISTICS, LLC, ASSOCIATED GROCERS, INC., ASSOCIATED WHOLESALE GROCERS, INC., BRUNO'S SUPERMARKETS, INC., CHENEY BROTHERS, INC., GORDON FOOD PRODUCTS CORP., McLANE COMPANY, INC., PIGGLY-WIGGLY CO., WINN-DIXIE STORES, INC., PENOBSCOT McCRUM, LLC and COUNTY SUPER SPUDS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey Appellate Division

OPPOSITION OF PENOBSCOT MCCRUM, LLC TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did Petitioner fail to raise and preserve in the state courts any argument about the applicability of federal law?

2. Does federal law apply to this case?

3. Is federal law on successor liability applicable to a case that does not involve federal law?

CORPORATE DISCLOSURE STATEMENT

Penobscot McCrum, LLC does not have a parent corporation. It does not own 10% or more of any publicly held company.

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STATEMENT OF THE CASE

This case has its origins with a company located in the State of Maine called Penobscot Frozen Foods, Inc. ("Penobscot"). Penobscot was engaged in the business of processing raw potatoes into specialty potato products. Over a period of many years, Penobscot borrowed millions of dollars from KeyBank Capital, Inc., a division of a large national bank that has extensive business dealings in Maine ("KeyBank").

Because Penobscot customers were located throughout the United States, Penobscot utilized third-party commercial shipping services to deliver its products. Alliance Shippers, Inc. ("Alliance") provided shipping services to Penobscot.

Penobscot encountered financial difficulties and went into default of its obligations to KeyBank. On April 29, 2004, KeyBank sold virtually all of the assets of Penobscot through two public foreclosure auctions. At the time of the auctions, Alliance owed several hundred thousands of dollars to Penobscot.

Penobscot McCrum, LLC, a Maine limited liability company ("McCrum"), made a bid for the assets at the foreclosure auctions. McCrum was the highest bidder at the two public foreclosure auctions. McCrum purchased the assets not only free and clear of the KeyBank lien but free and clear of all liens and encumbrances junior to KeyBank's liens, including any claims of unsecured creditors, such as Alliance. Contrary to the representations in the Petition, there is no evidence that KeyBank and McCrum entered

into any "secret bid agreement" or that the public foreclosure auctions were conducted "without disclosure."

Alliance commenced a lawsuit in New Jersey Superior Court for its unpaid shipping fees against Penobscot, McCrum and a number of consignees. The case was removed to the United States District Court for the District of New Jersey. The District Court remanded the case to the New Jersey Superior Court, holding there was no subject matter jurisdiction. Pet. App. D at 33a, 33b. The Federal District Court noted that Alliance, in its Complaint, did not allege a violation of any federal law, or even reference any federal law or interstate commerce.

The New Jersey Superior Court ruled that Maine law governed the question of whether McCrum was a successor to Penobscot. A trial took place in the New Jersey Superior Court. The Court entered judgment in the amount of $43,966.65 in favor of Alliance on its *quantum meruit* claim. Alliance then appealed the verdict to the New Jersey Appellate Division which affirmed the Decision. Pet. App. A at 1a-23a. Alliance then unsuccessfully sought certification with the New Jersey Supreme Court. Pet. App. F at 45a-46a.

Thereafter, Alliance filed this Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The Writ Should Be Denied Because Petitioner Failed To Raise And Preserve In The State Courts Any Argument About The Applicability Of Federal Law

Petitioner contends (Pet. at 10-29) that the New Jersey courts erred in failing to apply federal law in this case. Specifically, it asserts that the New Jersey courts erred in failing to apply federal law to its claim for freight transportation charges and in failing to apply federal common law to an issue of corporate successor liability.

Petitioner's claims are without merit, but more pertinently, this Court should not grant the Writ because Petitioner failed to raise any federal question in the Law Division. No federal question was raised in the New Jersey Superior Court. No federal question formed the basis of an appeal to the New Jersey Superior Court, Appellate Division. When Petitioner filed its Petition to the New Jersey Supreme Court, no argument was advanced that federal law applied.

This Court has consistently held that where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation to the state courts, unless the aggrieved party can affirmatively show the contrary. *Exxon Corp. et al. v. Eagerton*, 462 U.S. 176, 181, 103 S. Ct. 2296,76 L. Ed. 2d 497 (1983).

The Writ Should Be Denied Because Federal Law Does Not Apply To This Case

Petitioner maintains that a collection action arising out of freight charges establishes federal question jurisdiction. As the United States District Court for the District of New Jersey ruled in this case, it does not. In 1983, the Supreme Court held that an action for mere collection of filed rate tariffs does create federal jurisdiction. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 1050, 103 S. Ct. 1495, 75 L. Ed. 2d 928, 1983 U.S. Lexis 4291, 51 U.S.L.W. 3703 (1983). That case, however, was decided prior to deregulation of the industry which occurred in 1995. That deregulation resulted in the ICC Termination Act of 1995. *See*, *Matthew Bender*, 4-20 Goods in Transit § 20.03. Currently, tariffs are no longer required to be filed for rail, air and mini motor carriers. *Id.* The *Thurston* decision was based on the premise that because the carrier's right to collect unpaid charges depended on filed rates and the Interstate Commerce Act requirements, the collection of filed rate tariffs created federal question jurisdiction. That is not the case now. Therefore, that decision is distinguishable and not applicable to a case like the one presently before this Court, where filed tariffs are not in any way involved. *See*, *Central Transp. Int'l v. Sterling Seating, Inc.*, 356 F.Supp. 2d 786, 790 (E.D. Mich. 2005).

The Writ Should Be Denied Because Federal Law On Successor Liability Is Not Applicable To A Case That Does Not Involve Federal Law

Petitioner asserts that federal common law should apply to the question of whether McCrum is liable as a successor to Penobscot. As indicated above, Petitioner never made that argument in the state courts. Indeed, Petitioner asserted that New Jersey state law should apply to the issue of successor liability. The state courts were never even presented any argument that federal law should apply.

Moreover, because federal law does not govern this case, as set forth above, the federal common law with regard to successor liability does not apply.

CONCLUSION

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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